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# Labor's Many Constitutions (and Capital's Too)

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## LABOR'S MANY CONSTITUTIONS (AND CAPITAL'S TOO)

Eric Tuckert†

The movement to constitutionalize collective labor rights is growing as rapidly as organized labor's economic and political strength is eroding. This is not surprising. In an era in which organized labor enjoyed significant bargaining power and had the capacity to influence labor law, labor market policy, and macroeconomic policy more generally, there was no need to find ways to limit the ways states could legislate with respect to collective labor rights. It is precisely the loss of labor's power and the shift from a Keynesian or social democratic agenda, which supported collective bargaining as a macroeconomic policy, to a neoliberal agenda, which sees labor rights as market impeding, that has motivated efforts to put labor rights beyond the reach of ordinary government action.

There is already a large body of academic work addressing the constitutionalization of labor rights and so there is some burden on any one adding to it to justify their intervention. My goal in this Article is to explore three issues that have not been adequately addressed. First, there is a need to unpack, at a conceptual level, two distinct dimensions of collective labor rights, their thickness, and their hardness. I will elaborate on these further, but briefly by thickness I refer to the substantive content of labor rights, and by hardness I refer to their enforceability. These dimensions of labor rights have not been extensively considered because most writers have a pretty fixed idea of both. Collective labor rights are built around the principle of freedom of association and include the right to form unions, to bargain collectively and to strike and constitutional labor rights are legally enforceable. My goal here is to disrupt this settled understanding and provide a different analytical lens that allows us see and think more broadly about labor rights and how they are constitutionalized.

Second, I want to open up a discussion about the different geographic scales at which labor rights are being constitutionalized. For the most part,

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† Professor, Osgoode Hall Law School, York University, Toronto, Ontario. This Article originated as a response to a paper by Ruth Dukes given at the Voices at Work workshop. I want to thank Ruth for her stimulating paper. I benefited from comments by workshop participants as well as from Harry Glasbeek, Judy Fudge, and Brian Ray.

the literature addresses them separately. For example, Canadian labor rights are discussed at the national level under the *Charter of Rights and Freedoms*<sup>1</sup> (Charter), at the regional level under the *North American Agreement on Labor Cooperation*<sup>2</sup> (NAALC), and at the international level, through the International Labor Organization<sup>3</sup> (ILO). They are not usually considered together as a constitutionalizing structure. My goal here is to do precisely that so that we can better see the relationships between the different geographic scales and instruments through which the constitutionalization project is being pursued.

Finally, I want to put the project of constitutionalizing labor rights into the context of other constitutionalization projects that are also being actively pursued. While other writers have emphasized the salience of the neoliberal political-economic context for the development of constitutionalized labor rights, there has not been a discussion that compares the constitutionalization of labor rights with the constitutionalization of a neoliberal order. Not only does this comparison emphasize the significance of the neoliberal context in which the labor rights constitutionalization project is being pursued, but by comparing the hardness and thickness of the two constitutionalization projects at their different geographic scales we can better appreciate the ways in which these two projects shape and are shaped by each other.

Before turning to these issues, however, it is necessary to clarify the term constitutionalization, because there may be some controversy over what properly fits within its parameters. Martin Loughlin recently defined the term as "the attempt to subject all governmental action within a designated field to the structures, processes, principles and values of a 'constitution.'"<sup>4</sup> This formulation self-consciously recognizes the difficulty of defining a constitution and Loughlin spends some time talking about the evolution of constitutions and constitutional arrangements, as well as their ideological content. For our purposes, there are two key issues that need to be sorted out. First, Loughlin contrasts a republican notion of constitutionalism with a liberal one. In the former, government action is contained through the creation of institutional arrangements that provide for limited government. The classic form is the U.S. system of checks and

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1. *Canadian Charter of Rights of Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c.11.

2. *North American Agreement on Labor Cooperation*, Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 605.

3. The ILO is the international organization responsible for drawing up and overseeing international labor standards. For its history, see ANTHONY EVELYN ALCOCK, *HISTORY OF THE INTERNATIONAL LABOR ORGANIZATION* (1971).

4. Martin Loughlin, *What Is Constitutionalisation*, in *THE TWILIGHT OF CONSTITUTIONALISM* 47, 47 (Petra Dobner & Martin Loughlin eds., 2010).

balances through which political power is institutionally divided. The alternative, liberal constitutionalism, casts the constitution as a set of positive laws that are enforced by judicial bodies.

These different approaches to constitutionalization are reflected in the contrasting views of Otto Kahn-Freund and Hugo Sinzheimer. For Kahn-Freund, the optimal way to institutionalize labor rights was by embedding them in labor market institutions and practices, while Sinzheimer sought to have them positively juridified in Germany's Weimar constitution.<sup>5</sup> Our concern here is not which of these approaches is preferable for the purposes of advancing labor rights, but rather what we count as constitutionalization. Loughlin, I think, correctly observes that in contemporary practice, "especially when harnessed to the socio-economic forces that have been driving recent government changes (i.e., liberalization, marketization, globalization. . . . [c]onstitutionalisation refers to the processes by which an increasing range of public life is being subjected to the discipline of the norms of liberal-legal constitutionalism."<sup>6</sup> Therefore, for the purposes of this paper, we adopt Loughlin's definition of constitutionalization.

The second key issue is the contrast between domestic constitutionalization and supranational constitutionalization. The project of national constitutionalization is an old one although in many countries, like Canada, it has been deepened in recent decades by the triumph of the liberal-legal model. During this period of national constitutional development, there has also been a growth in supranational constitutionalism, which has two aspects according to Loughlin. The first involves the constitutionalization of transnational bodies themselves while the second is the emergence of networks of transnational governance that have eroded the foundational elements of national constitutionalism.<sup>7</sup> With regard to the latter, Loughlin is reluctant to label phenomena like the legalization of World Trade Organization (WTO) enforcement processes as constitutional, or at least sees this characterization as highly speculative. Others share his view.<sup>8</sup> Notwithstanding these considered objections, for our purposes it is useful to think of both these developments as aspects of constitutionalization. First, the distinction that Loughlin draws between the constitutionalization of institutions and governance networks is arguably not as sharp as he makes it out to be. While the WTO is not the same as the EU, it is a governance institution whose purpose is to constrain government

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5. Ruth Dukes, *Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law*, 35 J. L. & SOC'Y 341, 343 (2008).

6. Loughlin, *supra* note 4, at 61.

7. *Id.* at 63-64.

8. In addition to the authors footnoted by Loughlin, *id.*, see MARC D. FROESE, CANADA AT THE WTO 9-11 (2010).

action in ways that are not easily ignored or undone. David Schneiderman has forcefully argued that the investor rules regime is constitution-like in that "[i]t has the object of placing legal limits on the authority of government, isolating economic power from political power, and assigning investor interests the highest possible protection."<sup>9</sup> Second, our focus here is not on the question of whether labor or capital rights are fully constitutionalized, but rather how far the projects of constitutionalization have advanced. Therefore, even if it is correct to say that supranational constitutionalization is incomplete and contested, it still remains important to analyze the project itself.

The Article proceeds in three parts. First, it briefly discusses the thickness and hardness dimensions of labor's constitution. Second, it uses these two dimensions to map labor's constitution at the national, regional, and international geographic scales. At the same time, it also maps capital's constitution. Finally, the Article comes back briefly to suggest ways in which this comparative mapping approach can help us think more clearly about the challenges that lie ahead for the project of constitutionalizing labor rights.

### I. CONSTITUTIONAL MAPPING

For the purposes of mapping labor's constitution, I think it will be useful to focus on three of its dimensions. The first builds on the distinction that Ruth Dukes identifies between a thin conception of labor's constitution, focused on freedom of association and collective bargaining, and a thicker one, such as Sinzheimer's, that encompasses fundamental socioeconomic arrangements, such as those governing management and control of the means of production, and the political rules and institutional arrangements that shape the power resources of labor and capital. In this thicker view, labor's constitution is part and parcel of an economic constitution that creates and supports economic democracy.<sup>10</sup> The focus here, then, is on the thickness of labor's constitution, particularly as it relates to rights associated with workers' voice, although in other contexts we could extend this dimension to other aspects of labor's constitution, such as the extent to which it requires or prioritizes socioeconomic arrangements that support a human capabilities or human development project.<sup>11</sup>

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9. DAVID SCHNEIDERMAN, *CONSTITUTIONALIZING ECONOMIC GLOBALIZATION* 4 (2008).

10. Ruth Dukes, *Hugo Sinzheimer and the Constitutional Function of Labour Law*, in *THE IDEA OF LABOUR LAW* 57, 58–61 (Guy Davidov & Brian Langille eds., 2011).

11. For a neo-Fabian approach that builds on Amartya Sen's work, see SIMON DEAKIN & FRANK WILKINSON, *THE LAW OF THE LABOUR MARKET* (2005). For a Marxist approach, see MICHAEL A. LEBOWITZ, *THE SOCIALIST ALTERNATIVE: REAL HUMAN DEVELOPMENT* (2010).

A second dimension of constitutionalization that Dukes also addresses is its hardness or softness. She raises this in the context of her discussion of Articles 159 and 165 of the Weimar Constitution. Article 159 contained a thinner set of labor rights focused on the protection of freedom of association, while Article 165 purported to constitutionalize economic democracy. Weimar courts treated Article 159 as hard juridical law, but read Article 165 as an aspirational declaration whose realization depended upon legislative implementation that never materialized.

A third dimension of labor's constitution is its geographic scale. Here we can construct a continuum between national or even subnational political units on one end, expanding to regional and then to global institutions at the other. The growth of labor's transnational constitution is a twentieth century story that has been told elsewhere.<sup>12</sup> Although it is arguably the case that the regional and global scale of labor's constitution was insignificant in the first half of the twentieth century, they cannot be ignored at the turn of the twenty-first.

If we start running these three dimensions together, the necessity to talk about labor's many constitutions becomes clearer. More importantly, I hope this way of mapping helps us to navigate our way through the enormous complexity and difficulty of the current labor constitutionalization project. However, before trying to demonstrate this through a discussion of Canada's labor constitution, I want to raise one further complication: while we are focused on *labor's* constitution, it is crucial that we do not ignore other constitutionalization projects that are simultaneously being pursued and that may be antithetical to the realization of labor's constitution, thickly or thinly conceived. This concern has become more important in recent decades given the growing disjuncture between the partial constitutionalization of thin labor rights and the rise of what some have characterized as "the new constitutionalism,"<sup>13</sup> which has enhanced and anchored the power of capital by putting property and contract beyond the reach of local or national state interference, as part of larger project of creating a neoliberal social structure of accumulation (SSA).<sup>14</sup>

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12. For a brief overview, see BOB HEPPLE, *LABOUR LAWS AND GLOBAL TRADE* 25–67 (2005).

13. Stephen Gill, *Globalization, Market Civilization, and Disciplinary Neo-Liberalism*, 24 *MILLENNIUM: J. INT'L STUD.* 399 (1995); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004). See also Judy Fudge, *Constitutionalizing Labour Rights in Europe*, in *THE LEGAL PROTECTION OF HUMAN RIGHTS* 244 (Tom Campbell et al. eds., 2011) (exploring this paradox in the European context).

14. Social structure of accumulation theory emphasizes the role of political and cultural institutions, as well as economic ones, that support capitalist accumulation. A recent collection elaborates on the rise of a neoliberal social structure of accumulation since the 1980s. See *CONTEMPORARY CAPITALISM AND ITS CRISES* (Terrence McDonagh et al. eds., 2010).

Not only is there a disjuncture between these two projects, but many argue that at the thicker levels of constitutionalization the tide is strongly running in favor of capital's constitution.<sup>15</sup> It is difficult to think of a jurisdiction where a thick conception of labor rights, embracing economic democracy and prioritizing human development, has been strengthened over this period, while there are many where, to the extent that these arrangements existed, they have been weakened and the "new constitutionalism of disciplinary neo-liberalism" has been more firmly entrenched.<sup>16</sup> The result is a vicious circle. A neoliberal social structure of accumulation is partially constituted by the success of capital's constitutionalization project and the success of that project is favored by power of capital within that social structure. The project of constitutionalizing labor rights pushes in the opposite direction, but does so under adverse social, economic and constitutional conditions, whether we think of the project as a defensive one that aims to preserve some space for workers' voice and associational rights within a neoliberal regime or as part of a larger transformative strategy that aims to constitutionalize a different and more democratic regime of accumulation.

## II. LABOR'S AND CAPITAL'S CONSTITUTIONS: A CANADIAN PERSPECTIVE

Rather than elaborate in this short response on the mapping elements, it will be more productive to put them to work in a particular context, Canada. I start from the national scale, asking first about the hardness and thickness of the *Canadian Charter of Rights and Freedoms'* protection of freedom of association in s. 2(d). Clearly, this is hard, judicially enforceable law. It is, however, thin: freedom of association under the

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15. For example, Stephen McBride, *The New Constitutionalism: International and Private Rule in the New Global Order*, in RELATIONS OF GLOBAL POWER: NEOLIBERAL ORDER AND DISORDER 19 (Gary Teeple & Stephen McBride eds., 2011); David Schneiderman, *Investment Rules and the New Constitutionalism*, 25 L. & SOC. INQUIRY 757 (2000); Stephen Gill, *The Constitution of Global Capitalism*, THE GLOBAL SITE (2000), <http://www.theglobalsite.ac.uk/press/010gill.pdf> (last visited Apr. 6, 2012).

16. Gill, *ibid.* at 1. We might think here of Swedish social democracy and the reversal of economic democracy initiatives, such as the Meidner Plan, since the 1970s. See Jonas Pontusson, *Radicalization and Retreat in Swedish Social Democracy*, 163 NEW LEFT REV. 15 (1987). On the other end of the spectrum is South Africa, which has one of the most progressive constitutions in regards to the protection of social rights. There is much controversy over the effectiveness of the court in enforcing these rights, but regardless of one's position the fact remains that the realization of social rights runs against the current of neoliberal economic policies. Economic inequality has intensified, so that South Africa is now one of the most unequal societies in the world, where average life expectancy is just 51.5 years. MARC KENDE, CONSTITUTIONAL RIGHTS IN TWO WORLDS 243–75 (2009); Brian Ray, *Engagement's Possibilities and Limits As a Socioeconomic Rights Remedy*, 9 WASH. UNIV. GLOBAL STUD. L. REV. 399 (2010); Sam Ashman, Ben Fine & Susan Newman, *The Crisis in South Africa: Neoliberalism, Financialization and Uneven and Combined Development*, in SOCIALIST REGISTER 2011: THE CRISIS THIS TIME (Leo Panitch, Gregory Albo & Vivek Chibber eds.), <http://socialistregister.com/index.php/srv/issue/view/1097> (last visited Apr. 6, 2012).

*Charter* does not support economic democracy in the Sinzheimer sense, nor much that might be said to prioritize human development over other objectives. The thinness of labor rights under the *Charter* is often overlooked because conventional understandings of labor rights in Canada take this thinness for granted and instead focus on the questions that get litigated and the movement of the court within this limited range. Thus in the context of freedom of association, we have closely followed the evolution of the Supreme Court of Canada's jurisprudence, beginning with the Labor Trilogy,<sup>17</sup> which excluded collective bargaining and the right to strike from freedom association, to *Health Services*,<sup>18</sup> which decisively broke with the Trilogy and recognized a constitutional right to bargain collectively, to *Fraser*,<sup>19</sup> which seemingly signals a retreat that leaves in place the constitutional right but arguably scales back its meaning to a duty to consult and raises the evidentiary burden for vulnerable workers who want to argue that current law fails to satisfy the state's constitutional duty to enable them to meaningfully exercise their associational rights.<sup>20</sup> While this focus is understandable, any global assessment of Canadian labor's national constitution and the project of its advancement through litigation should not lose sight of its limited reach.

The formal constitutionalization of labor rights must also be considered against the background of the competing neoliberal constitutionalization project underway in Canada. It has been argued, for example, that the *Charter* itself does more to advance this neoliberal project than it does to protect labor and social rights. Of course, it must be noted that unlike the U.S. Constitution, the Canadian *Charter* does not protect property rights. As has been widely noted, however, the *Charter* is at its core a liberal document that is focused on the dangers of unchecked public power, largely ignoring the dangers of unchecked private power. State support for private property is not contestable, but state restrictions are, albeit indirectly. Corporations have used the *Charter* to protect their economic interests by challenging laws that limit commercial or political speech or that attempt to impose absolute liability for regulatory offences.

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17. Reference re Pub. Serv. Emps. Relations Act (Alta.), [1987] 1 S.C.R. 313; PSAC v. Canada, [1987] 1 S.C.R. 424; RWDSU v. Saskatchewan, [1987] 1 S.C.R. 460.

18. Health Serv. & Support - Facilities Subsector Bargaining Ass'n. v. British Columbia, [2007] 2 S.C.R. 391.

19. Ontario (Attorney General) v. Fraser, [2011] 2 S.C.R. 3.

20. For a useful summaries of the development of labor rights prior to *Fraser*, see Michael MacNeil, *Collective Bargaining in the Shadow of the Charter Cathedral: Union Strategies in a Post B.C. Health World*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1739392](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1739392); Judy Fudge, *Brave New Words: Labour, the Courts and the Canadian Charter of Rights and Freedoms*, 28 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 23 (2010). For a critical discussion of *Fraser*, see CONSTITUTIONAL LABOUR RIGHTS IN CANADA: FARM WORKERS AND THE FRASER CASE (Fay Faraday, Judy Fudge & Eric Tucker eds., 2012).



Property owners are also constitutionally protected from state restrictions that interfere with their ability to put their property to constitutionally protected uses. This is one of the reasons why it is much more difficult to successfully argue that the state owes a positive duty to protect labor organizing or to require collective bargaining than it is to challenge laws that restrict economic activity.<sup>21</sup>

A second but less noted path of neoliberal constitutionalization in Canada is through the deepening of free trade federalism,<sup>22</sup> by which we mean the removal of interprovincial barriers to trade. The starting point in Canada under the *Constitution Act* is one in which a great deal of labor and capital mobility is protected. For example, there are no tariffs on interprovincial trade and individuals are free to choose where they live and work in Canada. Under the division of powers, however, provinces have regulatory powers that can produce differences in standards among the provinces that may negatively affect interprovincial trade and labor mobility. Whether these differences should be viewed as undesirable barriers to trade or the legitimate expression of local preferences however is more of a normative question than an economic one and a move to limit local decision-making capacity is arguably best understood as part of the advancement of a neoliberal SSA.<sup>23</sup>

Deepening the constitutionalization of internal free trade is a project that has been developing over the past twenty years, although it has occurred largely out of the public eye and with little fanfare. The negotiation of the Agreement on Internal Trade (AIT) in 1995 was motivated by the strengthening of the free-trade agenda as expressed in the successful negotiation of the Canada- U.S. Free Trade Agreement in 1988 and the North American Free Trade Agreement in 1992. Without going into details, it requires each province to "give up, lessen, or discipline itself in using" governing capacities it previously enjoyed in the name of promoting liberalized interprovincial trade.<sup>24</sup> The AIT specifies broad principles that include "non-discrimination, rights of entry to or exit from provincial markets, that new provincial policies not create obstacles to

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21. There is a vast literature on the subject. For starters, see ANDREW PETTER, *THE POLITICS OF THE CHARTER: THE ILLUSIVE PROMISE OF CONSTITUTIONAL RIGHTS* (2010); Gavin W. Anderson, *Social Democracy and the Limits of Rights Constitutionalism*, 17 CAN. J. L. & JURISP. 31 (2004); JOEL BAKAN, *JUST WORDS* (1997); MICHAEL MANDEL, *THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA* (revised ed. 1994).

22. G. BRUCE DOERN & MARK MACDONALD, *FREE-TRADE FEDERALISM: NEGOTIATING THE CANADIAN AGREEMENT ON INTERNAL TRADE* (1999).

23. Mark Lee, *Investor Rights and Canadian Federalism: The Case of TILMA*, 82 *STUD. IN POL. ECON.* 85 (2008).

24. DOERN & MACDONALD, *supra* note 22, at 154.

trade, [and] that barriers due to differences in standards be reconciled.”<sup>25</sup> Deviations from these objectives are permitted provided they can be justified by “legitimate” objectives.<sup>26</sup> The dispute resolution mechanism emphasizes the promotion of negotiated settlements but where these fail a panel is established and makes a report. The report, however, cannot be legally enforced and in the last instance retaliatory action can be taken by a province against another where there has been a failure to implement panel findings. In reality, however, the 1995 dispute resolution mechanism was soft.<sup>27</sup>

Because of its perceived weakness, those favoring free-trade federalism have pursued measures for its constitutionalization by thickening and hardening investor rights. They have met with some success. First, in 2006, British Columbia and Alberta signed the Trade, Investment, and Labor Mobility Agreement (TILMA), which imposes stronger limits on provincial government action and gives investors a direct right to challenge provincial and municipal laws and regulations that arguably violate the agreement. Private panels hear such complaints and have the power to award \$5 million in penalties. The monetary liability of governments, however, may not be capped at this amount if a measure offends several sections of TILMA or if other investors make similar complaints.<sup>28</sup> Alberta and British Columbia hoped that other provinces would sign onto the agreement, but that did not occur. In July 2008, however, the provincial premiers agreed to amend the AIT dispute resolution procedure to empower AIT panels to impose a monetary penalty where a province has failed to comply. The size of the penalty is to be calculated based on several factors, including the seriousness of the “inconsistency” and the magnitude of its impact, but an annex limits the amount based on the size of the province, the maximum being \$5 million.<sup>29</sup> This provision only applied to government to government complaints, but in the summer of 2011 the Canadian and provincial governments announced their willingness to be sued by private parties.<sup>30</sup>

One might argue that the AIT and TILMA are not part of Canada's formal constitution, but it is beyond dispute that they serve a similar function, which is to bind the state's power in ways that are difficult to undo. Moreover, these agreements entrench a neoliberal SSA, which is

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25. John Whalley, *Disciplining Canada's Interprovincial Barriers: The Subnational WTO Approach As Another Option with or beyond an Extended TILMA*, 35 CAN. PUB. POL'Y 315, 320 (2009).

26. *Id.*

27. DOERN & MACDONALD, *supra* note 22, at 137–40; Whalley, *supra* note 25, at 320–21.

28. Lee, *supra* note 23, at 99–100.

29. Agreement on Internal Trade, §§ 1701 (11)(b), 1707.1, Annex 1707.1(2).

30. Erin Weir, *TILMA by stealth*, RABBLE CA. (Jul. 16, 2011), <http://rabble.ca/blogs/bloggers/progressive-economics-forum/2011/07/tilma-stealth> (last visited Apr. 6, 2012).

essentially what Harry Arthurs means when he speaks of Canada's "real" constitution as juxtaposed from its "formal" one.<sup>31</sup> The problem, as Arthurs sees it, is that even with an expansion of labor's formal constitutional rights to include collective bargaining and even potentially the freedom to strike, very little will be accomplished when those rights must be applied in the context of an advancing neoliberal regime of accumulation, entailing the deregulation of business, privatization of what were formerly state enterprises and responsibilities, and the globalization of production. The deepening constitutionalization of such a regime makes the achievement of meaningful constitutionalized labor rights that much more difficult.<sup>32</sup>

Moving to the regional geographic scale, the most significant regional instrument addressing labor rights is the *North American Agreement on Labor Cooperation* (NAALC), a side accord to the *North American Free Trade Agreement* (NAFTA). Starting from the dimension of thickness, it would be fair to say that NAALC's labor constitution is thicker than the *Charter's*. The eleven labor principles identified in the instrument not only include freedom of association, and particularly, the right to organize and to bargain collectively, but also the right to strike, a right which has not been recognized under the *Charter*.<sup>33</sup> In addition, the labor principles address forced labor, child labor, minimum standards, employment discrimination, equal pay, occupational health and safety, workers' compensation, and migrant workers, all of which are addressed by Canadian statutory law, some of which, like human rights codes, have a quasi-constitutional status.<sup>34</sup>

Apart from the question of whether the labor rights in the NAALC are thicker than those in the domestic Canadian labor constitution, it is clear that the NAALC does not entrench a labor constitution of worker voice in the economy as thick as the one Sinzheimer proposed. Indeed, when we focus on the broader dimension of the social structure of accumulation, we

31. Harry W. Arthurs, *Labour and the 'Real' Constitution*, 48 LES CAHIERS DE DROIT 43, 61 (2007).

32. Private sector union densities have been declining for years and reached a new modern low in 2010 of 17.5%. Public sector union densities have fared better, but public sector collective bargaining rights have been under attack. The most recent example of this was the Federal government's legislation ending the lockout of post workers, which was particularly regressive, even by the standards of back-to-work laws, in that it not only imposed a multi-year wage settlement, but did so at a level lower than what Canada Post had been offering at the time of the lock-out. Restoring Mail Delivery for Canadians Act, S.C. 2011, c. 17. For a more general overview of attacks of labor rights, see LEO PANITCH & DONALD SWARTZ, FROM CONSENT TO COERCION: THE ASSAULT ON TRADE UNION FREEDOMS (3d ed. 2003).

33. See Judy Fudge & Eric Tucker, *The Freedom to Strike in Canada: A Brief Legal History*, 15 CAN. LAB. & EMP. L.J. 333-53 (2010).

34. For a discussion of these more individualized rights, see Christian Brunelle, *The Growing Impact of Human Rights on Canadian Labour Law*, in HUMAN RIGHTS AT WORK: PERSPECTIVES ON LAW AND REGULATION 119 (Colin Fenwick & Tonia Novitz eds., 2010).

can see that NAFTA is better understood as part of the new constitutionalism entrenching disciplinary neoliberalism by strengthening investor and property rights, or as Grinspun and Kreklewich described it, a conditioning framework consolidating neoliberal reforms.<sup>35</sup> Indeed, it is a measure that has promoted the spatialization of production, which has the effect of weakening labor by putting it under the threat that production will be relocated elsewhere.<sup>36</sup> Moreover, it is no secret that the NAALC was negotiated as a result of political pressure on incoming President Clinton to create a mechanism that might provide some amelioration against the negative impact of free trade arrangements on U.S. labor. That is, in its best light the NAALC is a sidecar attached to a very different constitutional project running in the opposite direction.<sup>37</sup>

Finally, remaining at the regional level, there is the question of the NAALC's hardness or softness. Much of the NAALC is soft. It aims to promote the advancement of its labor principles in each jurisdiction and to facilitate cooperation between the three parties through a commission and secretariat.<sup>38</sup> There is no hard law requirement for the signatories to implement the labor principles and no mechanism to complain about their failure to do so. Rather, complaints are limited to the failure of a signatory to enforce whatever law in relation to the eleven labor principles that it has on the books. The complaint process is three tiered. Complaints are initially made to one of the National Administrative Offices (NAO). At the first tier the NAO that receives the complaint conducts a review, which may include public hearings, and issues a report. Ministerial consultations may follow. To date, no complaint has gone further than the first tier if for no other reason that the complainant loses carriage of the complaint and only one of the ministers has the power to push the complaint to tier 2. This is not a step that has been in any country's interest. For our purposes, however, it is important to note that complaints about freedom of association, collective bargaining and strikes cannot proceed beyond the first tier. Only complaints about the failure to enforce the eight so-called

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35. See generally Ricardo Grinspun & Robert Kreklewich, *Consolidating Neoliberal Reforms: 'Free Trade' As a Conditioning Framework*, 43 *STUD. POL. ECON.* 33 (1994). See also David Schneiderman, *NAFTA's Takings Rule: American Constitutionalism Comes to Canada*, 46 *UNIV. TORONTO L.J.* 499 (1996); Stephen McBride, *Quiet Constitutionalism in Canada: The International Political Economy of Domestic Institutional Change*, 36 *CAN. J. POL. SCI.* 251 (2003).

36. Michael Wallace & David Brady, *Globalization or Spatialization? The Worldwide Spatial Restructuring of the Labor Process*, in *CONTEMPORARY CAPITALISM AND ITS CRISES: SOCIAL STRUCTURE OF ACCUMULATION THEORY FOR THE 21ST CENTURY* 121 (Terrence McDonough et al. eds., 2010). See also Eric Tucker, *Great Expectations Defeated?: The Trajectory of Collective Bargaining Regimes in Canada and the U.S. post-NAFTA*, 26 *COMP. LAB. L. & POL'Y J.* 97 (2005).

37. NORMAN CAULFIELD, *NAFTA AND LABOR IN NORTH AMERICA* (2010).

38. Based on a recent visit to the website <http://www.naalc.org/coop-activities.htm> (27 June, 2010), it appears that apart from some publications, there is little ongoing activity in this area.

“technical labour standards” can go to the second tier, and of those only three, child labor, minimum wages, and health and safety can proceed to the third, where sanctions can be imposed. It is notable that a state’s failure to enforce whatever “voices at work” laws it has on the books is the most weakly protected.<sup>39</sup>

Even though the NAALC is, for all practical purposes, soft law that does not preclude it having a significant influence on the development of Canada’s labor constitution by its influence on government practice and judicial discourse. There is little evidence, however, that it has done either. Only two complaints have been made against Canada. One was refused because it did not involve a failure to enforce and the other was settled with an agreement to review the issue. No change to the substantive law resulted. Canadian courts also do not cite the NAALC as a source of international norms that should be used to interpret the *Charter*.<sup>40</sup>

The weak enforcement of the NAALC, and especially its workers’ voice provisions, contrasts sharply with the strong enforcement powers for trade violations under the NAFTA, which permits private investors to take an offending government to binding arbitration by private arbitrators vested with the power to award damages and have its orders enforced in domestic courts.<sup>41</sup> A study of investor-state disputes under NAFTA up to October 2010 identified sixty-six cases, twenty-eight of them (43%) against governments in Canada. The study found that the rate at which claims are being made is growing and that in the last five years, 75% of claims were against Canadian governments. Of those twenty-eight claims, NAFTA tribunals awarded damages to investors in two. Canada has settled three claims and in two it agreed to pay damages to the investor. Tribunals have dismissed claims in four cases, four claims were withdrawn by the investor, eight claims are inactive and seven claims are active. The cost of these claims has been substantial. Canada has paid out \$157 million in damages and incurred millions of dollars in costs.<sup>42</sup>

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39. For a description, see Lance Compa, *NAFTA’s Labour Side Agreement Five Years On: Progress and Prospects for the NAALC*, 7 CAN. LAB. & EMP. L.J. 1 (1999).

40. For a somewhat more hopeful assessment of NAALC’s potential, based largely on its fostering of labor transnationalism, see Ruth Buchanan & Rusby Chaparro, *International Institutions and Transnational Advocacy: The Case of the North American Agreement on Labor Cooperation*, 13 UCLA J. INT’L L. & FOREIGN AFF. 129 (2008).

41. For critical assessments of the investment rights regime and its constitutional implications, see GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (2007); David Schneiderman, *A New Global Constitutional Order?*, in RESEARCH HANDBOOK ON COMPARATIVE CONSTITUTIONAL LAW 189 (Rosalind Dixon & Tom Ginsburg eds., 2011).

42. Scott Sinclair, *NAFTA Chapter 11 Investor-State Disputes*, CANADIAN CTR. FOR POL’Y ALTERNATIVES, <http://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2010/11/NAFTA%20Dispute%20Table.pdf> (last visited Apr. 6, 2012).

It is more difficult to assess the impact of NAFTA Chapter 11 claims on public policy development and democratic process. Early tribunal decisions took an expansive view of investor rights, although some recent ones have given more weight to regulatory concerns. Nevertheless, there is some evidence that the threat of investor claims has produced regulatory chill and the Canadian government's recent settlement of the AbitiBowater claim for \$130 million (based on a debatable claim that its timber and water rights were taken) is also likely to encourage more investor claims.<sup>43</sup>

The difference between the protection of labor rights in the NAALC and the protection of investor rights under NAFTA emphasizes the different strengths of the two constitutionalization projects, again requiring that we put Canadian labor's soft and thin regional constitution into perspective when discussing its current state and prospects. It is a phenomenon that also characterizes EU developments.<sup>44</sup>

We turn finally to the international scale of labor's constitution, where the International Labor Organization (ILO) is the central player. Discussions of the ILO are fraught with difficulty and controversy. This becomes immediately obvious when we ask about the thickness of labor's constitution under the ILO. For better or worse, the adoption of the *Declaration on Fundamental Principles and Rights at Work* in 1998, constituted a narrowing of the ILO's 'legislative' agenda,<sup>45</sup> but at the same time, the Decent Work framework embraces a thicker agenda of social and labor rights, albeit one that, in Jill Murray's analysis, has not been "fully 'constitutionalized.'"<sup>46</sup> These difficulties are reduced to an extent if we focus exclusively on the workers' voice dimension of the ILO's labor constitution. Freedom of association principles have been enshrined in the ILO Constitution since 1919 and the Declaration of Philadelphia in 1944. They are further developed in Convention 87, respecting freedom of association and the right to organize, and Convention 98 respecting the right to organize and collective bargaining. These principles have been elaborated by the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association

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43. STEPHEN MCBRIDE, *PARADIGM SHIFT: GLOBALIZATION AND THE CANADIAN STATE* 146–56 (2d ed. 1005); SCHNEIDERMAN, *supra* note 9, at 146–56; Sinclair, *supra* note 42.

44. See Fudge, *supra* note 13, at 463.

45. The debate is fierce. See, e.g., Philip Alston, "Core Labour Standards" and the Transformation of the International Labour Rights Regime, 15 EUR. J. INT'L L. 457 (2004); Brian Langille, *Core Labour Rights—the True Story (Reply to Alston)*, 16 EUR. J. INT'L L. 409 (2005).

46. Jill Murray, *Taking Social Rights Seriously: Is There a Case for Institutional Reform of the ILO?*, in *HUMAN RIGHTS AT WORK: PERSPECTIVES ON LAW AND REGULATION* 361 (Colin Fenwick & Tonia Novitz eds., 2010).

(CFA) and are identified as core rights in the *Declaration*.<sup>47</sup> But it is also clear that the ILO does not embrace a thicker agenda of economic democracy insisting upon worker voice at the level of coequal control over the means of production. According to Gernigon et al., the purpose of collective bargaining under the ILO labor constitution is “the regulation of terms and conditions of employment, in a broad sense, and the relations between the parties.”<sup>48</sup> This “broad sense,” however, is associated with the bargaining over managerial prerogatives in relation to matters such as promotions, and dismissals, not decisions over the deployment of the means of production.<sup>49</sup>

Turning next to the hardness dimension, ILO norms are essentially soft ones that are dealt with through a complaint process that produces communications directed to member governments requesting them to take corrective action and to keep the ILO informed of its response. As with other soft law mechanisms, the more important question is whether they influence government action or the development of labor’s domestic constitution. The answer to the former question, at least in the Canadian context, is that ILO findings have little sway with Canadian governments. Indeed, in 2002 the Committee on Freedom of Association asked its chairperson to hold consultations with the Canadian delegation to discuss its concern about the unresponsiveness of Canadian governments to its findings and requests. This action did not produce any change and Canadian governments continue to violate ILO norms on freedom of association without apparent concern for their international obligations.<sup>50</sup>

On the other hand, ILO norms have influenced the Supreme Court of Canada’s freedom of association jurisprudence over many years, beginning with Chief Justice Dickson’s dissent in one of the Labor Trilogy cases, *Alberta Reference*, where he claimed that the *Charter* should be presumed to provide at least as great a level of protection as is found in international human rights documents Canada has ratified.<sup>51</sup> More recently, international labor norms were one of the three grounds offered by the Supreme Court of Canada in extending freedom of association to protect collective bargaining in *Health Services*.<sup>52</sup>

Despite this apparent acceptance of ILO norms, questions remain about the court’s commitment to these principles and their application by

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47. For elaboration, see Adelle Blackett, *Mutual Promise: International Labour Law and B.C. Health Services*, 48 SUPREME COURT L. REV. 365, 369–77 (2009); Bernard Gernigon, Alberto Odero, & Horacio Guido, *ILO Principles Concerning Collective Bargaining*, 139 INT’L LAB. REV. 33 (2000).

48. Gernigon, Oder & Guido, *supra* note 47, at 51.

49. *Id.* at 39–40.

50. DEREK FUDGE, *COLLECTIVE BARGAINING IN CANADA: HUMAN RIGHT OR ILLUSION* (2006).

51. [1987] 1 S.C.R. 313, 349.

52. [2007] 2 S.C.R. 391, ¶¶ 69–79.

ILO bodies. The most striking recent example of the court's selective use of ILO jurisprudence is in the majority judgment in the recent *Fraser* decision. The judgment cites the CFA's finding that the British Columbia legislation that was the subject of the *Health Services* litigation violated workers' freedom of association,<sup>53</sup> but it ignores the CFA's interim decision that the *Agricultural Employees Protection Act* fails to provide agricultural workers with machinery promoting collective bargaining.<sup>54</sup> One can only assume the reason for this omission is that the CFA finding would be "inconvenient" given the majority judgment's refusal to draw the same conclusion. But if the court is truly committed to taking ILO principles seriously, it cannot treat them purely instrumentally, citing those findings that support its conclusions and ignoring those that do not.

In addition to the issue of selective citation of CFA decisions, the SCC is also not committed the interpretation of ILO norms by ILO supervisory bodies, but rather insists on giving its own meaning to terms like collective bargaining. Their approach contrasts with the one adopted by the European Court of Human Rights (ECtHR) in the *Demir and Baykara* case, which also involved the right to collective bargaining. In that case the ECtHR held that the right to collective bargaining must meet the standards set by the ILO and it deferred to the judgment of ILO supervisory bodies about what is that standard.<sup>55</sup>

As with the other geographic scales, neoliberal constitutional projects have enormous traction and are being conducted through other international institutions with much greater capacity than the ILO to shape the emerging world economic order.<sup>56</sup> The most important of these are the "unholy trinity" of the International Monetary Fund (IMF), the World Bank and the WTO.<sup>57</sup> The IMF and the World Bank have played a large role in promoting and enforcing macroeconomic and structural reforms that entrench neoliberal regimes, including privatization of state enterprises, the liberalization of capital markets, tax reforms that favor the wealthy, deregulation to create friendlier environments for investors and trade

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53. 2011 S.C.C. 20, ¶ 94. I leave aside here the question of the court's competence to use ILO norms, raised by Brian Langille, *Can We Rely on the ILO?*, 13 CAN. LAB. & EMP. L.J. 363 (2007).

54. INT'L LAB. ORG., 358TH REPORT OF THE COMMITTEE ON FREEDOM OF ASSOCIATION, ¶¶ 357–58 (Nov. 2010), [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@relconf/documents/meeting\\_document/wcms\\_146695.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meeting_document/wcms_146695.pdf).

55. *Demir and Baykara v. Turkey*, 2008 Eur. Ct. H.R. 1345, ¶¶ 147–54, available at <http://www.bailii.org/eu/cases/ECHR/2008/1345.html> (last visited Apr. 6, 2012). The contrast between the SCC and the ECtHR is developed by Keith Ewing & John Hendy, *Giving Life to the ILO—Two Cheers for the SCC*, in CONSTITUTIONAL LABOUR RIGHTS IN CANADA (Fay Faraday et al. eds., 2012).

56. See STEPHEN GILL, POWER AND RESISTANCE IN THE NEW WORLD ORDER 131–35 (2d ed. 2008). A separate mapping of new constitutionalism would be necessary to provide greater specification of its dimensions.

57. See generally RICHARD PEET, UNHOLY TRINITY: THE IMF, WORLD BANK AND WTO (2d ed. 2009).



liberalization. While these reforms create a global neoliberal order, the direct impact of the IMF is on borrowers who face “structural conditionality” in order to gain access to IMF loans and since wealthier developed countries, like Canada, are not in the position of having to rely on the IMF, we will not consider its system of rules and their enforcement here.<sup>58</sup> Rather our focus is on the WTO.

The WTO was created in 1995 as a result of the Uruguay Round of negotiations that lasted from 1986 to 1994. The motivation to create the WTO was to strengthen global free trade, which had made limited advances under the General Agreement on Tariffs and Trade (GATT) signed in 1994, largely in the area of tariff reductions. This goal was to be achieved by creating a stronger institutional structure with a wider mandate and greater enforcement powers than had existed under the GATT. In addition to achieving further reductions on tariffs, the Uruguay Round introduced new rules regarding nontariff barriers, which could potentially include an array of local, provincial or national regulatory programs as well as import licenses and quotas and government subsidies, and established agreements on trade in services, intellectual property rights and trade-related investment. As a result, the WTO regime reached far more deeply into national economic policies than had the GATT.<sup>59</sup> In my terms, the WTO regime has become thicker.

The regime also became harder. A system of adjudication existed under the GATT, but it was constrained by rules that gave defendants the ability to delay or block complaints. Under the WTO's more powerful mechanisms, members can no longer block the establishment of a tribunal, the rulings of the tribunal are binding, and retaliatory trade sanctions can be imposed if a country is found not to have complied with a tribunal decision. Unlike NAFTA, under the WTO only states, however, have standing to bring complaints against other members.<sup>60</sup>

It is beyond the scope of this Article to provide an assessment of the direct effects of WTO dispute resolution on the capacity of states generally, or on Canada in particular, to regulate or pursue development strategies that do not comply with neoliberal policy prescriptions. Froese concludes his study of the impact of WTO trade litigation on Canada with the cautious observation that: “[I]ts influence on domestic politics is only beginning to

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58. For recent critical assessments, see, PEET, *id.*; Nitsan Chorev & Sarah Babb, *The Crisis of Neo-Liberalism and the Future of International Institutions: A Comparison of the IMF and the WTO*, 38 THEORETICAL SOCIOLOGY 459 (2009). For an account of the inner dynamics that shaped the IMF's turn toward neo-liberalism, see JEFFREY M. CHWIEROTH, *CAPITAL IDEAS: THE IMF AND THE RISE OF FINANCIAL LIBERALIZATION* (2010). Finally, for an older critique of the IMF and World Bank, see MICHEL CHOSSUDOVSKY, *THE GLOBALIZATION OF POVERTY* (1999).

59. Chorev & Babb, *supra* note 58, at 470–71.

60. For a more detailed description, see FROESE, *supra* note 8, at 147–54.

be understood. However, these cases suggest that the WTO has less direct influence on policy than do domestic groups. Its influence is felt in more subtle ways. As an institution, it is certainly a game changer.”<sup>61</sup>

He does not elaborate on the indirect influence the WTO has on domestic policy and on the capacity of domestic groups to reshape that policy, perhaps because it is probably impossible to isolate a specific indirect WTO effect.<sup>62</sup> When viewed as part of a larger international project to constitutionalize a neoliberal social structure of accumulation, it is fair to conclude that its indirect effects weigh in the direction of strengthening the hand of capital, even if aspects of the WTO still respect a limited right of states to adopt somewhat different regulatory models and to enact measures protecting the environment and public health.<sup>63</sup>

This is not to say that the ILO is unable to influence these other institutions and gain some commitment on their part to the protection of core labor rights in their programs. Indeed, there has been some cooperation between the ILO and the WTO. For example, in the 1996 Singapore Declaration, the members of the WTO renewed their commitment to core labor standards and identified the ILO as the body responsible “to set and deal with” these standards. The Declaration went on to state the WTO view that core labor standards are best promoted through trade liberalization, that it rejects the use of labor standards for protectionist purposes and that it recognizes the legitimacy of low-wage labor as a comparative advantage. The politics of bringing labor rights into the WTO system are complicated and it is far from clear that even if a labor rights clause were adopted it would be effective, since there is no place for unions or nongovernmental organizations to make complaints, and even if a complaint were made by a member, presumably it would have to demonstrate that the violation of core labor standards created an unfair trade advantage. In any event, to date, the WTO has resisted further engagement with the labor rights issue<sup>64</sup> and its pursuit within the WTO really involves pushing the organization in the opposite direction of its primary agenda. As Richard McIntyre notes:

Thus, in the end, the campaign for labour standards is not purely about labour standards but about creating a wedge for bringing the concerns of working people to the tables where the great issues of globalization are

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61. *Id.* at 135.

62. Critical assessments of the impact of the WTO on workers' rights tend to focus more on trade liberalization than on particular WTO decisions. For example, see STEVEN SHRYBMAN, *THE WORLD TRADE ORGANIZATION: A CITIZEN'S GUIDE* 93–109 (2001).

63. For a more positive review, see TRISH KELLY, *THE IMPACT OF THE WTO* (2007). For a negative view, see PEET, *supra* note 57, at 203–16; MCBRIDE, *supra* note 43, at 156–65.

64. PEET, *supra* note 57, at 216–23; Gerrard Greenfield, *Core Labor Standards in the WTO*, 5 *WORKINGUSA* 9 (Summer 2001).

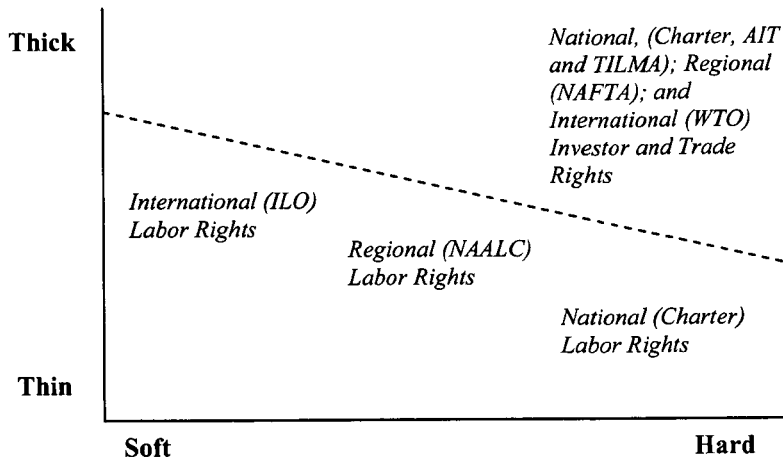
decided. That we have so much difficulty doing so must be attributed both to contemporary moral convention and class interest.<sup>65</sup>

Chart 1 below graphically depicts a simplified map of labor's and capital's constitution. Two features are notable. First, as labor's constitution becomes thicker at larger geographic scales it also becomes softer. Narrow labor rights under the *Charter* are judicially enforceable, while for all practical purposes the somewhat broader labor rights under the NAALC are subject to low level ministerial consultations, and the ILO's even broader labor rights are reviewable by a committee that can make findings. The second feature is that what I have called capital's constitution tends to cluster in the harder and thicker quadrant of the map and hang above Canada's labor constitution at every geographic scale. I have not attempted to map out differences in thickness for the national, regional and international scales of capital's constitution, but I think it is clear that they cover a much broader range of issues and cut more deeply into state sovereignty than does labor's constitution. They establish the structural conditions within which labor rights must operate. As far as hardness goes, apart from *Charter* rights, which are equally juridified for labor and capital, capital's constitution is much harder at every scale in the sense that there are dispute resolution mechanisms that result in enforceable judgments. Indeed, the trend has been to strengthen the enforceability of capital's constitution, as we have seen in recent developments in free-trade federalism at the national scale, the coming into force of NAFTA in 1994 and the establishment of the WTO in 1995.

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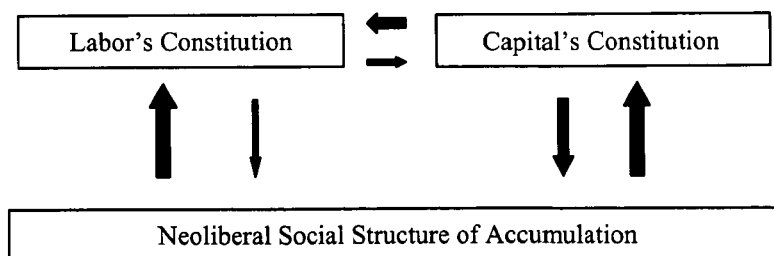
65. RICHARD P. MCINTYRE, ARE WORKER RIGHTS HUMAN RIGHTS 175 (2008).

**Canada's Labor and Capital Constitutions**  
**Chart 1**



Moreover, all of this takes place within a partially constitutionalized neoliberal social structure of accumulation, which exerts a stronger pull on labor's constitution than labor's constitution exerts on capital's constitution. These relationships are depicted in Chart 2.

**The Context of Labor's Constitution**  
**Chart 2**



### III. CONCLUDING REFLECTIONS

This Article proposed a scheme for mapping labor's constitution(s) on three dimensions: its thickness, its hardness, and its geographic scale. Taking the case of Canada, it found that labor's constitution becomes thicker as its geographic scale becomes larger. It, however, also found that as labor's constitution becomes thicker, it also becomes softer. It also emphasized that the project of constitutionalizing labor rights must be considered against the background of the project of constitutionalizing capital rights. Again, using the Canadian case, the Article argues that at every geographic scale, capital's constitution is thicker than labor's and that, with the exception of *Charter* rights, capital's constitution is also harder. Moreover, while there is a clear trend toward hardening capital's constitution by strengthening enforcement procedures, there is no evident trend toward the hardening of labor's constitution, again except at the level of the *Charter*, where labor rights, to the extent they are recognized, are hard.

In this final Section, I want to briefly raise a few questions that follow from this analysis. The first relates to the thickness of labor's constitution. For the most part, labor's constitutionalization project has been limited to seeking protection for the rights to organize, bargain collectively, and strike. In the larger scheme of things, these might seem to be modest goals. The importance of seeking their protection in an era in which neoliberal governments are stripping away these rights, however, cannot be understated. Just recently in Canada the federal government threatened to pass back to work legislation before a strike at an airline commenced, passed back to work legislation ending a lockout by the employer in which it imposed a wage settlement less than the employer's last offer, and stopped flight attendants from striking by invoking a provision that limits industrial conflict where it puts the health and safety of Canadians in serious and immediate danger.<sup>66</sup>

Yet several questions remain. First, we might ask whether the project of constitutionalizing a thick worker voice—something like Sinzheimer's economic constitution—should be revived, notwithstanding the impossibility of its realization in the foreseeable future. The question may be significant because the answer can shape the way the demand for freedom of association is framed. The dominant approach has been to frame freedom of association as a human right, with the legal connotation that it limits governmental attacks on associational freedoms and requires

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66. Jim Stanford, *Raith's Three Principles Only Run One Way*, GLOBE & MAIL, Nov. 2, 2011, at A19.

public support for their enjoyment in the face of employer resistance. This is a defensive approach that secures a space for the exercise of associational rights within a largely untransformed neoliberal social structure of accumulation. Within this framework, a revival of the economic democracy project is unnecessary. Indeed, the linking of associational freedoms to an economic democracy frame might be strategically harmful because it will potentially alienate judges whose support for constitutionalizing association rights is crucial. Thus it is best to argue that labor's constitution can be realized without significantly disturbing the current economic order.

Alternatively, we might want to consider whether too much is conceded by abandoning the economic democracy project, especially if the evidence suggests severe limits on the extent to which labor's associational rights can be effectively constitutionalized as human rights in a neoliberal social structure of accumulation that is in the process of being constitutionalized. The Canadian case suggests there are significant limits on what can be accomplished at the national scale, especially if the project is pursued primarily through litigation. On the regional level, the North American experience is also not very encouraging either, but the story may be different for the Europe and the Antipodes.

Additionally, if popular mobilization is required to make associational rights meaningful on any geographic scale, is a human rights frame adequate for the task, or is it, perhaps, even counterproductive because it embraces a liberal discourse of rights that potentially undermines labor's capacity for class-based approaches to advancing workers' rights?<sup>67</sup> Does this require, as Sinzheimer argued, that we recognize collective representation is necessary because under capitalism class conflict is inherent and, therefore, the advancement of workers' interests as individuals is bound up with the improvement of their class? And, if we are really serious that the full development of human potential should be the central aim of a just society, must workers' voice be thickly constitutionalized so that their labor is no longer alienated through the contract of employment to an employer who determines how it will be deployed to expand exchange value, leaving workers with constrained opportunities to develop themselves as full human beings through their work and through collective deliberations over what use values are needed and how they will be produced and distributed?

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67. For arguments along these lines, see Larry Savage, *Workers' Rights As Human Rights: Organized Labor and Rights Discourse in Canada*, 34 LAB. STUD. J. 8 (2009); Kevin Kolben, *Labor Rights As Human Rights?*, 50 VA. J. INT'L L. 449 (2009–2010); Nelson Lichtenstein, *The Rights Revolution*, 12 NEW LAB. FORUM 61 (2003); David Brody, *Labour Rights As Human Rights: A Reality Check*, 39 BRIT. J. INDUS. REL. 601 (2001).

All talk of economic democracy must seem hopelessly utopian in an age when the project of creating a market-based "stark utopia"<sup>68</sup> as Polanyi described it, is so far advanced. But if Polanyi is also right that an unregulated market order will produce severe dysfunctional social, economic and ecological consequences that over time will generate large-scale social resistance, then perhaps the project of retrieving Sinzheimer's thick labor constitution is relevant.

Another issue for further reflection is the geographic scale of labor's constitution. As we have seen, in Canada the labor movement has worked primarily at the national and the international scale, through the *Charter* and the ILO, to promote its "labor rights are human rights" agenda. The NAALC has pretty much fallen by the wayside, although transnational activism, aimed largely at failures to enforce Mexican labor law, has increased.<sup>69</sup> Australia also seems to have followed this course, presumably because of the absence of a regional framework for pursuing labor rights, while in the United Kingdom its membership in the EU provides a very different opportunity structure.<sup>70</sup> While national labor movements may focus on what works best from within their own jurisdiction, larger questions remain about the implications of the uneven geographic development of labor's constitution and whether significant differences can be sustained before downward pressures begin to operate through international labor arbitrage. Of course, the ILO and regional instruments exist in part to push in the opposite direction and strengthen national labor constitutions, and transnational labor activism supports those efforts, but it is an open question whether these institutions and activists have the capacity to do so. Thinking about how to build these capacities and strengthen labor's constitutions in a regionally and globally coordinated way are important and difficult questions for a transnational voices at work project.<sup>71</sup>

Finally, we might want to inquire more deeply into mechanisms for hardening labor rights. For the most part, we tend to associate hardness with judicial enforcement, putting courts at the centre of the project. Apart from the historical antipathy of most courts towards collective labor rights

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68. KARL POLANYI, *THE GREAT TRANSFORMATION* 3 (1957).

69. See generally Buchanan & Chaparro, *supra* note 40.

70. Colin Fenwick, *Workers' Human Rights in Australia*, in *HUMAN RIGHTS AT WORK: PERSPECTIVES ON LAW AND REGULATION* 41 (Colin Fenwick & Tonia Novitz eds., 2010); ACL Davies, *Workers' Human Rights in English Law*, in *HUMAN RIGHTS AT WORK: PERSPECTIVES ON LAW AND REGULATION* 171 (Colin Fenwick & Tonia Novitz eds., 2010).

71. For some interesting reflections on the difficulties of labor rights transnational activism on, see Gay Seidman, *Deflated Citizenship: Labor Rights in a Global Era*, in *PEOPLE OUT OF PLACE: GLOBALIZATION, HUMAN RIGHTS, AND THE CITIZENSHIP GAP* 109 (Alison Brysk & Gershon Shafir eds., 2004).

and the question of whether that can be overcome in an environment in which neoliberalism is ascendant, there is also the question, mentioned earlier, of the impact of pursuing labor rights through litigation on the development of popular mobilization strategies that might be more successful in the long run. As well, there are overarching questions of the courts' democratic legitimacy and its institutional capacity to develop and enforce constitutionalized economic and social rights of any kind.<sup>72</sup> It is interesting that capital's constitution is increasingly enforced by private arbitration, thereby reducing democratic accountability and exacerbating concerns about democratic legitimacy. Can labor's constitution be hardened without resort to traditional mechanisms of judicial review, but in a manner that builds democratic capacities?

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72. For a thoughtful overview of the literature and a discussion of these issues in the context of South Africa, see Brian Ray, *Policentrism, Political Mobilization, and the Promise of Socioeconomic Rights*, 45 STAN. J. INT'L L. 151 (2009).



